Supreme Court, U.S.
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No. 01-881

IN THE

Supreme Court of the United States

GENERAL ELECTRIC CAPITAL CORP. and
MONTGOMERY WARD CREDIT SERVS., INC.,

Petitioners,

v.

GARY A. THIESSEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

In February of 1998, the trial court found that Respondent had "come forward with direct evidence of an overall policy of purported age discrimination." Pet. App. 120a. That direct evidence has never been shown to a jury. This Court can not bring finality to the case, whether it grants certiorari or not. This Court's decision on the petition for writ of certiorari, one way or the other, is only one step, taken somewhere in the middle of this case's existence — not at the end. This case is still on the vine, a long way from the ripeness required for review by this Court.

Petitioner has filed its petition for writ of certiorari following the Tenth Circuit Court of Appeal's unremarkable reversal of the grant of summary judgment by the trial court. No trial has occurred yet. No final ruling has been made. Any ruling by this Court will not bring finality to the case. Because of concerns relating to statues of limitations, five related lawsuits are pending in four different circuits. If the Court denies certiorari, as it should, those five lawsuits will continue to be stayed, pending the resolution of the matter in the District of Kansas, where this case originated and where it should be allowed to proceed to conclusion. The law and facts of this case are not fully developed, and will not be unless and until this case reaches a trier of fact, whether in the District of Kansas, or elsewhere.

Further, this case is not of general significance. Rather, it is the appeal of an isolated defendant in a fact specific case seeking reversal of the run-of-the-mill decision that the case should go to trial. The only people with any interest in this case are 28 individuals and one company. Beyond that, this case has no impact on anyone else, and particularly

no impact on class actions or the judicial process. By inaccurately characterizing this opt-in ***ADEA/FLSA collective action*** as a ***Rule 23 class action***, petitioner seeks to impress upon this Court an urgency that simply does not exist. If, as petitioner suggests, the law regarding Rule 23 class actions someday might require the attention of the highest Court in this country, the vehicle to address those concerns should rightfully be an actual Rule 23 class action — not this ADEA collective action.

Where the overwhelming majority of petitions reviewed by this Court present no questions warranting certiorari, Petitioner here claims that this case presents no less than three "enormously important" questions. As noted, this is not even a class action case, at least in the terms described by the petitioner. This is a 216(b) collective action, under the FLSA and the ADEA. It is not, never has been and never will be a Rule 23 class action. Thus, all the Rule 23 cases and class action statistics, relied upon by petitioner, have virtually no application here. Second, the number of claimants in this case is, by any standard, small. There are only 28 total members of this opt-in collective action (there were originally 31, but three have dismissed their claims). As such, the "sky is falling" claims of petitioner are unrealistic, contrived, and hyperbolic. Given the relatively small numbers, case management is not a real issue, but a red herring invented by the petitioner, and this Court need not waste its valuable time. Significantly, the procedural posture of this case makes it a poor candidate for certiorari review.

BRIEF STATEMENT OF THE FACTS

Respondent brought this case as an opt-in collective action, pursuant to the ADEA and FLSA, alleging that he and others similarly situated were the victims of a pattern and practice of age discrimination. Over the course of discovery, respondent amassed hundreds of documents, and thousands of pages of deposition testimony, which ultimately led the trial court to its conclusion that respondent had done more than make mere allegations, but had come forward with "direct evidence of an overall policy of purported age discrimination." Some of that evidence is mentioned below in respondent's comparison of this case, and its fact-intensive posture, to cases cited by the petitioner.

REASONS FOR DENYING THE WRIT

I. There is no "Mature Circuit Split" as to a trial court's authority to weigh evidence and make factual findings.

A.) Petitioner complains that there is a split among the circuits on the issue of whether a trial court can review the merits of a claim in certification decisions, and make findings of fact in that context. There is no split of authority in this area — the context and level of fact finding endorsed by petitioner is not supported by any circuit, much less the Tenth.

It is one thing to examine the merits of a class action in the context of examining the requirements of Rule 23 — are there enough claimants to satisfy the numerosity requirement, for example? It is another thing altogether to examine the ultimate question — was there discrimination? No circuit court has ever held that such fact finding is permissible.

This is critical in this case, because the trial court here found such an ultimate fact — that the petitioner had "repudiated" what the trial court had earlier described as "an overall policy of purported age discrimination." The trial court used that factual determination — that there had been a repudiation — as a cornerstone for its subsequent erroneous rulings decertifying the collective action and granting summary judgment on the individual claims of Gary Thiessen.

The cases relied upon by petitioner do not expose a "mature split" among the circuits. There is no conflict, for example, between the Tenth Circuit's opinion and *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). That opinion does not address the issue here regarding a district court's authority to engage in fact finding. Rather, that opinion deals with class certification in "mass tort" litigation, where tens of thousands of claimants, in 50 states with different common laws, made claims of negligence against an entire industry. In dicta, at 1298, the *Rhone-Poulec Rorer* opinion makes "guesses" at the merits of the claim "[f]or the ***limited purpose*** of comparing the situation that will face defendants if the class certification stands." *Id.*, emphasis added. In no way does the opinion suggest (much less hold) that a trial court is entitled to weigh evidence regarding the ultimate facts of the case.

Likewise, there is no conflict between the Tenth Circuit's opinion and *Szabo v. Bridgepost Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001). The *Szabo* case has nothing to do with the issues here. Among other things:

- *Szabo*, like *Rhone-Poulc Rorer*, is a Rule 23 class, not a 216(b) class.

- Plaintiff in *Szabo* complained of breach of warranty and fraud in the sale of a machine; the Seventh Circuit noted early in the opinion that class actions for breach of warranty and fraud pose "serious problems about choice of law, the manageability of the suit, and thus the propriety of class certification." *Szabo*, 249 F.3d at 674.

- Fraud cases — totally unlike the blocker policy and MDP program clearly shown to affect respondents here — include issues of who made what representations to whom, when and where. There is no such problem here, as the Tenth Circuit found.

- In *Szabo*, dealers of the product in question were located in different states, saying different things to different people about different uses and applications of the machine. *Id.*

- The district court in *Szabo* evaluated the complaint under a Rule 12(b)(6) standard, believing that it must accept all of plaintiff's allegations in the complaint as true. *Id.*, at 675. Thus, the "fact finding" in *Szabo* was in an entirely different context.

The Tenth Circuit, if faced with the far different facts of *Szabo*, would reach the exact same conclusion. The *Thiessen* case, in stark contrast to *Szabo*, was not ruled on a motion to dismiss a Complaint, but involves over one year of heavy discovery, tens of thousands of documents, over 40 depositions, and numerous rounds of written discovery, interrogatories and briefing. The *Szabo* trial court reached

conclusions based only on allegations in a Complaint. As the Tenth Circuit aptly quoted (from the trial court's opinion):

> Mr. Thiessen has ***not simply averred the existence of a discriminatory policy*** or merely argued that circumstantially one should infer its existence by virtue of numerous people in the protected category having incurred adverse employment actions. ***Instead, he has come forward with direct evidence of an overall policy of purported age discrimination.***

Pet. App. 120a, emphasis added. The meaty, fact-bound evidentiary record presented to and studied by the Tenth Circuit is voluminous and ready for trial. It is far stronger than *any* case petitioner has ever or could ever cite, and includes, ***among other things***,

- Prepared lists of "blockers" that include calculations of the costs associated with terminating the "blockers" (Response to Appellee's Petition for Rehearing with Suggestions for Rehearing en banc, Tab 1);

- Memos regarding the implementation of the discriminatory "blocker policy" (*Id.*, Tab 2);

- Slide Shows detailing steps to be taken with "blockers" (i.e. eliminating positions, early retirement, or simply moving younger employees around the "blockers") (*Id.*, Tab 3);

- Testimony from "insider" HR representatives, describing their protests that the proposed plan was age discrimination. (See R.O.A., App. 10, depositions of Thomas and Wolf)

- Agendas of meetings where Blocker Strategy was discussed (Response to Appellee's Petition for Rehearing with Suggestions for Rehearing en banc, Tab 4);

- A series of e-mails identifying certain plaintiffs as "blockers" targeted for termination (*Id.*, Tab 5);

- Presentations describing actual implementation of the plan, indicating that "two blockers were separated" (Defendants deny ever implementing the program) (*Id.* Tab 6);

- An affidavit (apparently ignored by the District Court) from high-level GECC executive Rick Richards describing the ageist culture at GECC (*Id.*, Tab 7); and

- An e-mail from a distressed HR manager concerned that she "knew too much" about the ageist activity and subsequent attempt at cover up. (*Id.*, Tab 8).

Obviously, unlike *Szabo*, the evidentiary record in this case (most of it "disputed" by petitioner) goes far beyond mere "allegations" in a complaint. As the Tenth Circuit properly analyzed the facts under established controlling law, the District Court erred in resolving the merits without a trial. *See Adams v. Ameritech Services, Inc.*, 231 F.3d 414 (7th Cir. 2000) (also reversing and remanding for trial ADEA collective action).

The *Szabo* opinion gives examples of when routine procedural, ***non-merits*** fact finding is permissible, e.g. where the plaintiff alleges 10,000 class members, and the defendant

says there are only 10, a court can make "findings" on the issue of numerosity. 249 F.3d at 676. So also the trial court can make fact findings as to subject matter jurisdiction, or whether *forum non conveniens* applies. *Id. Szabo* (and each case addressing the issue) speaks in terms of the court making a "*preliminary inquiry* into the merits,"or "going beyond the pleadings." That unremarkable law is perfectly consistent with this decision. No court ever has held that the district court has the power to make the ultimate findings regarding the ultimate fact — whether a policy of discrimination (for which the district court acknowledges direct evidence) was actually implemented against an individual employee.

Petitioner also claims that the Fourth Circuit's opinion in *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267 (4th Cir. 1980) conflicts with this case. The date of the opinion is noteworthy — the case pre-dates passage of the Civil Rights Act of 1991, and therefore the case was tried to the court. The fact that the case ***went to trial***, in and of itself, distinguishes it from this case. A proper finder of fact was presented with evidence to determine whether a pattern and practice existed. Further, that opinion discusses the findings, ***at trial*** (where fact finding is appropriate), necessary to determine whether commonality and typicality exist — elements of a Rule 23 class, but not a 216(b) "similarly situated" class. Since the case was tried to the Court, of course it was permissible for the Court to make factual determinations concerning class requirements. And since the case actually went to trial, those determinations were made at the proper stage (even though the appellate court ultimately determined that the findings were unsupported by the evidence at trial).

Similarly, *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995) is not in conflict. *Mooney* involves 154 opt-in plaintiffs, in 93 different departments, in 11 separate locations in Saudi Arabia. Plaintiffs were alleging "297 separate RIF's of expatriate employees." 54 F.3d at 1215. The court in *Mooney* simply said, "We cannot say the district court abused its discretion in finding that the opt-in plaintiffs were not similarly situated." *Id.*, at 1216. The court added: "In so holding, we specifically *do not* endorse the methodology employed by the district court and *do not* sanction any particular methodology."

B.) This is not a "recurring problem," as suggested by the petitioner. First, petitioner claims that it has looked at the ". . . most recent available statistics," the *Judicial Business of the United States Courts: 1998 Report of the Director*, Tables X-4 and X-5. (Pet. p. 14) However, an analysis of that report, along with the same reports *for the years 1999 and 2000* (for some reason not mentioned by petitioner), dispel petitioner's concerns. While it is true that, in 1998, over 1,800 class actions were filed, *only 85* of those cases were employment discrimination cases, amounting to *less than 5% of all class actions*. Of the more than 3,000 class actions that were pending, 71 were employment discrimination cases — *less than 3% of all class actions*. The next year, the number of class action filings went up (from 1,881 to 2,133), *while the number of employment discrimination class actions dropped (from 85 to 74). Judicial Business of the United States Courts: 1999 Report of the Director*, Tables X-4 and X-5. In 2000, the number of class actions rose again by over 200 (from 2,133 to 2,393), but the number of employment discrimination class actions rose only 5 (from 74 to 79). *Judicial Business of the United States Courts: 2000 Report of the Director*, Tables X-4 and X-5.

Even with that small increase, the *employment discrimination class action filings in 2000 were fewer than in 1998.*

Petitioner's reliance on dated statistics, especially when more recent contrary figures are available, is dubious at best. If there is a trend at all, it is toward fewer — not more — employment discrimination class actions. There is no need for this Court to stem some imaginary tide of growing class action litigation under Rule 23. And more to the point: the statistics have no bearing on a simple reversal of summary judgment in an as-yet untried 28 person opt-in ADEA case.

II. There is no "Mature Split" on the application of *Teamsters*.

A.) First, there is no split of authority in FLSA Rule 216(b) cases — the only supposed "split" identified by petitioner is in Rule 23 class action cases, which specifically do not apply to collective actions. *See, e.g., Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096, n.12 (11th Cir. 1996). In particular, the split complained of by petitioner generally involves cases where compensatory damages are at issue. In this ADEA case, compensatory damages are unavailable. As such, this case is not the proper vehicle for resolving that "split." The Tenth Circuit correctly noted in its opinion that the standard to be used in certification decisions is a "similarly situated" standard, not a Rule 23 commonality or typicality standard. Pet. App. 13a. As such, all the Rule 23 cases relied upon by the petitioner have limitation application here, if any. In a desperate attempt to manufacture a "mature circuit split", petition has used Rule 23 cases — and in many instances, non-employment discrimination Rule 23 cases — to address a circumstance where Rule 23 does not apply.

Furthermore, many of the employment cases relied upon by petitioner are brought under the Civil Rights Act of 1991, which not only provides for compensatory damages not available under the ADEA, but which also involve a more detailed analysis of Rule 23 requirements, relating to not only to commonality and typicality, but the availability of injunctive relief, such as a Rule 23(b)(2) class.

The first "conflicting case" cited by petitioner, *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001) no longer presents a conflict — the opinion was withdrawn by the Fifth Circuit on February 1, 2002 (see, *Smith v. Texaco, Inc.*, __ F.3d __, 2002 WL 131415 (5th Cir. 2002).[1]

Petitioner also claims a conflict with *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000). However, that case specifically states that ***it is not*** a *Teamsters* case. In fact, it supports the application of *Teamsters* in employment discrimination cases:

> The *Teamsters* rationale is particularly appropriate in employment discrimination cases because of the relationship between a finding of systemic disparate treatment by an employer, and a plaintiff's burden under *McDonnell Douglas* to establish a prima facie case of individual disparate treatment. After a pattern or practice of discrimination has been proven, *Teamsters* mandates that in order to gain individual relief

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1. Given the strong dissenting opinion in *Smith*, the fact that the mandate had been held by one or more judges, and the fact that a response to the en banc petition had been requested, the possibility existed that *Smith* would not only have been withdrawn, but reversed.

> plaintiffs must come forward and "show that [they] unsuccessfully applied for a job."

Rutstein, 211 F.3d at 1237-38, citing *Teamsters*, 431 U.S. at 362. The court noted that the individuals are never relieved of their burden of ultimately showing individual discrimination, but the plaintiffs "are relieved of the prima facie burden of demonstrating that they were qualified for the job at issue in subsequent individual proceedings." *Rutstein*, 211 F.3d at 1239. The court then noted the distinction between *Teamsters* and the case before it — in *Rutstein*, plaintiffs had to prove an intent to discriminate on the basis of race, a requirement "more demanding than any of the requirements imposed on plaintiffs in a *McDonnell Douglas* case, requiring as it does, that the plaintiff bring forth evidence of actual intent on the part of the defendant." *Id. Rutstein* noted that the requirement that an individual demonstrate that he or she is qualified for a job under *McDonnell Douglas* is not particularly rigorous, but the same did not hold true where, in *Rutstein*, Avis may have refused to contract with a plaintiff for any number of reasons having nothing to do with plaintiff's ethnicity. *Id.*

The *Rutstein* opinion, cited as conflicting with the Tenth Circuit opinion here, actually provides an excellent analysis of why employment discrimination class actions ***are different*** from other class actions. This analysis underscores that there is no conflict between the cases, but rather, a critical distinction between them, which favors a *Teamsters* approach in one but not the other.

Petitioner also cites other Rule 23(b)(2) cases, which are inapposite here, as noted. The fact remains that this case is an ADEA collective action, not subject to a Rule 23 analysis, without claims for compensatory damages.

B.) The Tenth Circuit's decision is not severely flawed. First, the Tenth Circuit never declared that plaintiffs should be ensured a procedural advantage. The Tenth Circuit simply held that, ". . . if plaintiffs were to establish a pattern or practice of discrimination, they would be entitled to a presumption that the individual employment actions taken against them were the result of such discrimination." (Pet. App. 42a) The Court was ensuring plaintiffs nothing. Indeed, as a case management tool in this small, 28 member class, a multi-stage procedure is far more efficient than the alternative, five lawsuits in four federal courthouses, trying the same facts and evidence to five different juries. The petitioner's claims of case management nightmares may be reasonable where a defendant is faced with hundreds or thousands of class members, but it is unconvincing here, where the numbers are small. It is ludicrous to suggest that 28 claimants presents case management problems.

Second, the Tenth Circuit "did not even address" constitutional concerns because there are none to address. Petitioner begins its constitutional argument by citing mass tort cases, for the proposition that a multi-stage *Teamsters* trial somehow denies the defendant its constitutional rights. *Malcom v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) is an asbestos mass tort case, consolidating the claims of 600 plaintiffs against between 14 and 42 manufacturers of asbestos products. *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) was a case brought by surviving family members against manufacturers of aluminum wiring, alleged to have caused a fire that resulted in the deaths of 165 people, and injury to many more. Both cases involve large numbers of claimants taking on entire industries. Neither case applies to this 28 plaintiff pattern and practice employment discrimination case. Petitioner, through creative

use of ellipses, even goes so far as to suggest that *Beverly Hills* was a pattern and practice case (Pet. 22); the irony is that the case ultimately *upheld the very bifurcation that petitioner now calls unconstitutional.*

Petitioner's next argument is that individualized issues are properly addressed in the first phase of trial. That is wrong. *Ardrey v. United Parcel Service*, 798 F.2d 679 (4th Cir. 1986), is a Rule 23 case appealed *on discovery issues*. (*Id.*, 798 F.3d at 680). "The instant appeal concerns the district court's handling of the discovery phase of the case." *Ardrey*, 798 F.2d at 684. That case decided only whether the trial court had been too restrictive in discovery by refusing the plaintiffs discovery on evidence of a pattern, limiting discovery instead to individualized claims. Ultimately, *Ardrey* held that individualized defenses **may** defeat a class claim, but **not necessarily**. *Ardrey* concluded that rebuttal of each alleged instance of discrimination "weakens but does not defeat" a class claim. *Ardrey*, 798 F.2d at 680. As such, that Fourth Circuit case creates no conflict here.

Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985), was bench tried — not in phases, but all at once. Because the case was *not* separated into different phases, obviously individualized defenses were presented *at trial*. Nevertheless, *Coates* cited *Teamsters* for its rule that, in pattern and practice cases, the **focus** often will not be on individual employment decisions, "**but on a pattern of discriminatory decision-making**." *Coates*, 756 F.2d at 532, citing *Teamsters*, 431 U.S. at 360, n.46. The Third Circuit case relied upon by petitioner, *Western Elec. Co., Inc. v. Stern*, 544 F.2d 1196 (3d Cir. 1976), predates *Teamsters*, and cannot be relied upon here, especially where more recent cases control. Again, no conflict exists.

Finally, petitioner cites *Windham v. American Brands, Inc*, 565 F.2d 59 (4th Cir. 1977) as being in conflict with the Tenth Circuit's opinion here. *Windham* is an anti-trust case, where the crux of the action is individual injury; thus while such a case may present a common question of violation, issues of injury and damage remain critical and are always strictly individualized. That case involved as many as 20,000 class members, and thousands of sales during four marketing seasons, and would have require individual proof of each. Likewise, the other Rule 23 class cases cited by petitioner (*Smith, supra* has been withdrawn by the Fifth Circuit; *Rutstein, supra*, involves individual compensatory and punitive damages) are not in conflict with the holding of the Tenth Circuit.

III. The Tenth Circuit is not in conflict with other Circuits on the timeliness issue.

First, the Tenth Circuit made *no final ruling* concerning the inclusion of anyone in the class beyond Thiessen, and the issue is not ripe for review by this Court. The Tenth Circuit deferred ruling on the issue, leaving it to the second stage: "Until the first stage is resolved, we question whether it is proper for a court to consider summary judgment motions regarding second stage issues (i.e. whether individual plaintiffs are entitled to relief)." (Pet. App. 20a) The opinion specifically left such determinations to the second stage of the proceedings — indeed, the opinion did not even establish the appropriate time frame for the claims, but held that the jury in the first stage would make findings on whether the ageist policy was implemented, and if so, how long it lasted. (Pet. App. 23a, n.12). Those findings would then help determine who would be included in the final class for the second stage. As such, the issue is far from being ripe.

The Tenth Circuit properly refused to engage in discussion of the merits or application of the continuing violation theory. Obviously this issue will arise in the pretrial, trial and post-trial stages. Petitioner improperly asks this Court to use this innocuous case — with no final holding regarding continuing violations — as a springboard to "clear up" supposed conflicts among the various circuits. As this opinion does not even pass on the efficacy or merits of the doctrine, it is not the proper vehicle for the requested broad review of continuing violation law.

Furthermore, there is no reason to delay the denial of a writ of certiorari based on other decisions this Court may make. The continuing violation theory is applied if there exists **either** a serial violation — a series of related acts, one or more of which are within the limitations period — or a systemic violation — a systemic policy or practice of discrimination that operated in part within the limitations period. The Tenth Circuit noted that the respondent was pursuing a pattern and practice case; thus the second approach applied, i.e. the systemic program theory. The case now before the Court, *National Railroad Passenger Corp. v. Morgan*, 121 S. Ct. 2547 (2001), is an individual plaintiff case (not a pattern and practice case), alleging a serial (rather than systemic) violation, and therefore offers no reason for delaying denial of certification.

A.) There are no splits of authority on this issue. First, even assuming the *National Railroad Passenger Corp. v. Morgan* case would apply here, there is no reason to delay the denial of certiorari here — the application of the continuing violation to the facts of this case, as noted earlier, will not even be made until after success by respondents at the first stage. In fact, if **petitioner** is successful at the first

stage, the issue is mooted altogether. In any case, this is not the vehicle for resolving the supposed split — the issue is barely (if at all) framed by the Tenth Circuit' opinion for review by this Court. The resolution of this split should come from a case where the issues are central, ripe and properly framed.

Second, petitioner misstates the Tenth Circuit's holding in this case. The Tenth Circuit has not "resurrected" other plaintiff's stale claims. In fact, whether or not they are stale has not even been determined, and will *not* be until resolution of first stage issues, including the time frame of the systemic policy of discrimination. As such, the imagined split on this issue is not presented by this case. Simply put, there is *nothing* in the Tenth Circuit's opinion that is contrary to cases in any other circuit.

Petitioner cites *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001) as being in conflict. There is nothing in the Tenth Circuit's opinion here that conflicts with *Hipp* at all. *Hipp* stands for the proposition that, before the continuing violation will apply, there must be an act of discrimination within the statutory time period; the law in the Tenth Circuit is the same, and this case did nothing to change that. In fact, the Tenth Circuit's opinion here acknowledged *Hipp* with regard to the two-tiered approach to certification (Pet. App. 34a, n.4); had there been a split in the cases, such a conflict would have been addressed.

B.) The Tenth Circuit did not "extend" the continuing violation doctrine. As noted, there has been no trial, so there is no urgency here. The Tenth Circuit has not extended the continuing violation doctrine, as suggested by petitioner. Further, since this Court has already granted certiorari in

National Railroad Passenger Corp. v. Morgan, the issue will be resolved. Whatever the outcome of that case, it certainly will be applied in this case by the trial court, at the appropriate time, i.e. the second phase of the trial. At that time, petitioner will have the opportunity to raise timeliness issues with regard to remaining claimants, and the trial court will address any "stale" claims, should they exist. Presumably, this Court will provide guidance on the issue in its opinion in *National Railroad Passenger Corp. v. Morgan*.

CONCLUSION

This case is not the proper vehicle for the sweeping review of Rule 23 class action litigation urged by the petitioner. It is a fact driven case, still awaiting trial and final ruling. The opinion creates no conflicts, and this case's procedural posture is far from ripe. As such, the petition for writ of certiorari should be denied.

Respectfully submitted,

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